No. 88-10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HARTE HANKS COMMUNICATIONS, INC.,
Petitioner,

v.

DANIEL CONNAUGHTON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICI CURIAE OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, ASSOCIATED PRESS, CAPITAL CITIES/ABC, INC., CBS INC., THE CINCINNATI ENQUIRER, CHRONICLE PUBLISHING COMPANY, DOW JONES & COMPANY INC., GLOBE NEWSPAPER COMPANY, THE MIAMI HERALD, NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL BROADCASTING COMPANY, INC., NATIONAL NEWSPAPER ASSOCIATION, NEWSLETTER ASSOCIATION, THE NEW YORK TIMES COMPANY, THE PHILADELPHIA INQUIRER, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SOCIETY OF PROFESSIONAL JOURNALISTS SIGMA DELTA CHI, TIME INC., THE TIMES MIRROR COMPANY, AND TRIBUNE COMPANY IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

This brief is submitted on behalf of twenty-one *amici curiae* who include broadcasters, publishers of newspapers and magazines, and associations of working journalists. Together, they comprise a broad cross-section of the news media in this country.* The *amici* are more fully described in the Appendix to this brief.

These *amici* have a profound interest in this matter because they or their members frequently publish or broadcast news articles and editorials about election campaigns and often publicly endorse political candidates. This Court has consistently held such activities to be at the core of speech protected by the First Amendment. The ruling of the court below punishes such speech and if not reversed will have a broad negative impact on speakers beyond the litigants in this case.

Because the *amici* operate under a constant threat of libel claims, they rely on appellate courts to review independently jury determinations of actual malice. Independent review is fundamental to First Amendment protection, and the appellate court below totally disregarded and misconstrued its meaning. The *amici*, therefore, request that this Court grant the petition to correct the Sixth Circuit's encroachment on fundamental First Amendment protections.

SUMMARY OF ARGUMENT

The decision of the court below poses a two-pronged threat to free and open debate, either of which alone merits the attention of this Court to preserve "the majestic protection of the First Amendment." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504 (1984). First, the court below eviscerated the protection of independent review provided by *Bose*. Second,

* Written consent of both parties has been filed with the Clerk of Court pursuant to Rule 36 of the Court.

the court undermined the fundamental right of public debate in the political arena, by allowing an inference of actual malice to be drawn from the petitioner newspaper's endorsement of a political opponent of the respondent.

This Court in *Bose* has required appellate courts to review independently the entire record whenever a jury concludes that a libel defendant acted with actual malice. The court below abdicated that duty by speculating as to what inferences would be consistent with the jury's verdict of liability and then portraying itself as bound by Fed. R. Civ. P. 52(a) to agree with those inferences unless clearly erroneous. This application of *Bose* both conflicts with decisions of other courts and, if adopted elsewhere in the future, would effectively eliminate independent review.

The Court below also held that a newspaper's endorsement of a political candidate opposing the respondent and its normal competition with another newspaper that endorsed the respondent constitute evidence of actual malice. This departure from the principle of viewpoint neutrality and complete misunderstanding of the meaning of actual malice cannot be allowed to stand without seriously chilling editorial speech and sending a message to editorial writers that they should avoid commentary on issues that are the subjects of news stories.

At the heart of this controversy is a newspaper's coverage of a political campaign. This Court has repeatedly intervened to protect the vigorous political speech that is fundamental to democratic self-governance. It should do so again in this case.

ARGUMENT

I. The Sixth Circuit Abdicated Its Constitutional Duty To Review Independently The Jury's Determination Of Actual Malice.

A. *New York Times* and *Bose* Require Appellate Courts to Review *De Novo* All Record Evidence Relating to a Jury's Finding of Actual Malice.

This Court held in *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964), and reaffirmed in *Bose*, 466 U.S. at 498-511, that appellate courts are required by the First Amendment to conduct an independent, *de novo* review of the entire record when a fact finder determines that a libel defendant has acted with actual malice.[1] This "independent" review is expressly distinguished from the traditional Rule 52(a) "clearly erroneous" review that grants deference to a jury's findings and inferences. *Bose*, 466 U.S. at 501, 514.

New York Times defined the scope of such independent review to include all record evidence relating to the jury's finding of actual malice:

> This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied . . . . [T]he rule is that we "examine for ourselves the statements in issue and circumstances under which they were made". . . . We must "make an independent review of the whole record". . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

New York Times, 376 U.S. at 285 (citations omitted).

Bose reiterated the *New York Times* standard, 466 U.S. at 508, and emphasized that independent review

[1] *See also Time Inc. v. Pape*, 401 U.S. 279, 284 (1971); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 11 (1970); *Beckley Newspapers v. Hanks*, 389 U.S. 81, 82 (1967).

means "*de novo review*." *Id.* at n.27. "Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold . . . ." *Id.* at 511. Thus, *Bose* requires *independent review* of the *record evidence*, while Rule 52(a) requires *deferential review* of the *jury's findings and inferences.*

The Court elaborated three reasons for this special standard of review:

> First, the common-law heritage of the [actual malice] rule assigns an especially broad role to the judge in applying it to specific factual situations. Second, the content of the rule is not revealed simply by its literal text . . . . Finally, the constitutional values protected by the rule make it imperative that judges—and in some cases judges of this Court—make sure that it is correctly applied.

Id. at 502.

The wide disparity between jury and appellate determinations of liability provides empirical support for this Court's concerns. Juries have been overwhelmingly more favorable to defamation plaintiffs than have appellate judges. Public official plaintiffs prevailed in approximately 76% of libel actions against media defendants that went to the jury in the period between 1976 and 1986. *Libel Def. Resource Center Bull. No. 21*, at 2, 5 (Oct. 31, 1987); *Libel Def. Resource Center Bull. No. 16*, at 2 (Mar. 15, 1986). Two-thirds of those verdicts were subsequently reversed on appeal. *Libel Def. Resource Center Bull. No. 16*, at 2 (Mar. 15, 1986). *See also Libel Def. Resource Bull. No. 7*, at 1, 21 (July 15, 1983) (a 1983 study revealed that 51 out of 60 appeals by libel defendants on constitutional issues resulted in reversal or modification of the verdict).

This discrepancy between appellate and jury deliberations is one compelling reason the *amici* are before this

Court to urge that the First Amendment protection of independent review not be lost. Juries cannot be expected to apply consistently the constitutional protections shielding defamation defendants. Larger concerns about self-censorship and overbroad restrictions on speech cannot be adequately addressed by a jury focusing on a single case. Courts, therefore, have the constitutional task of providing an independent review of the record in light of overriding First Amendment concerns.

Three federal courts of appeals, soon after *Bose*, acknowledged their duty to review independently the entire record and in each instance examined specific subsidiary factual issues in concluding that there was not clear and convincing evidence of actual malice. *Herbert v. Lando*, 781 F.2d 298, 308 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986); *Mr. Chow v. Ste. Jour Azur, S.A.*, 759 F.2d 219, 230 (2d Cir. 1985); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1088-90 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985); *Brasslett v. Cota*, 761 F.2d 827, 839-40 (1st Cir. 1985).[2]

The court below, however, has joined three other federal courts of appeals in departing from this understanding of *Bose*. Those courts have either enunciated an overly deferential standard of review for jury findings and inferences or have questioned whether *Bose* imposes a different standard of review than the traditional Rule 52(a) "clearly erroneous" standard.[3] Those decisions

[2] *See also Tavoulareas v. Piro*, 817 F.2d 762, 777 (D.C. Cir.) (*en banc*), *cert. denied*, 108 S. Ct. 200 (1987). That court declined to resolve what it determined to be the "somewhat murky dispute" over whether *Bose* requires independent review of underlying facts and inferences or in fact "does not alter the traditional rules governing the review of jury verdicts." The court below nevertheless condemned the *en banc* majority in *Tavoulareas* for invading the traditional function of the jury. App. at 33a n.11.

[3] The Fifth Circuit, while acknowledging *Bose*, nonetheless stated that "the factfinder retains its traditional role in the determination of the facts . . . ." *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987). In *Tavoulareas v. Piro*, 759 F.2d 90, 107-08, *vacated*, 763 F.2d 1472 (D.C. Cir. 1985), the panel decision held that *Bose* requires independent review only of the "ultimate fact" of actual malice but not of the preliminary factual findings upon which the ultimate finding of actual malice is based. The Seventh Circuit now appears convinced that *Bose* does not clarify whether independent review extends to facts, evaluations of credibility and the drawing of inferences. *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1128-29 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988).

This split of authority extends to the state courts as well. *Compare McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 727 P.2d 711, 231 Cal. Rptr. 518 (1986), *cert. denied*, 107 S. Ct. 1983 (1987) (expressly requiring independent review of all record evidence); *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 334 S.E.2d 846 (1985) (recognizing that *Bose* requires independent review of all record evidence) *with Sible v. Lee Enter., Inc.*, 729 P.2d 1271, 1272 (Mont. 1986), *cert. denied*, 107 S. Ct. 3242 (1987) (the Montana Supreme Court simply ignored *Bose* and viewed the record in the light most favorable to the plaintiff, the *losing* party at trial); *Wanless v. Rothballer*, 115 Ill. 2d 158, 503 N.E.2d 316, 321 (1986), *cert. denied*, 107 S. Ct. 3213 (1987) (although the Illinois Supreme Court purported to follow *Bose*, it stated that it should not reexamine discrete facts or make independent findings with regard to supporting evidence of actual malice); *Lent v. Huntoon*, 143 Vt. 539, 470 A.2d 1162, 1170 (1983) (failing to recognize the independent review required by *New York Times*, the Vermont Supreme Court reviewed the evidence of malice in the light most favorable to the plaintiff).

have not only created a split in the federal courts of appeals over the meaning of independent review, but have also undermined the First Amendment protections of *New York Times* and *Bose*. Certiorari is necessary to reaffirm that *New York Times* and *Bose* require *de novo* review of *all* record evidence relating to a finding of actual malice.

B. The Sixth Circuit Gave Deference to Nonexistent Jury Findings and Ignored Critical Evidence That Compels Reversal of the Jury Verdict.

The Sixth Circuit's departure from *Bose* in this case is the most complete rejection of independent review by a federal court of appeals to date. As the dissent pointed

out, the factual testimony at trial was largely undisputed. *Id.* at 62a. Thus, it cannot be that the determination of actual malice in this case was simply a matter of witness credibility. Rather, it turned on which facts the jury credited as evidence of actual malice and the inferences it drew from those facts. Those assessments are precisely what *Bose* requires appellate courts to review independently, which the court below refused to do.

Instead, the court below granted deference to findings and inferences it imputed to the jury—on issues other than credibility of the witnesses—that are nowhere found in the record. The jury was simply presented with three special interrogatories, asking whether the statements were (1) defamatory, (2) false, and (3) published with actual malice. *Id.* at 89a. The sum total of the jury's "findings" was an affirmative answer to each of these three conclusory questions. *Id.* From this, the court of appeals somehow divined an elaborate set of findings and inferences the jury "could have" made concerning (1) the petitioner's endorsement of the respondent's political rival, (2) the petitioner's competition with another newspaper in the marketplace and (3) the petitioner's alleged failure to investigate and bad motive in publishing the article. *Id.* at 35a-36a.[4]

The court below then deferred to these manufactured "jury findings," concluding that they were not clearly erroneous, and held that they constituted clear and convincing evidence that petitioner acted with actual malice. *Id.* at 36a-37a. As the dissent points out, *id.* at 49a, by creating and then deferring to these supposed "findings," the court below ignored the two most telling aspects of

[4] The constitutional irrelevance of these "findings" to a determination of actual malice is set out in Part II, *infra*. Moreover, respondent's admissions in a prepublication interview with petitioner eradicate any claim that petitioner failed to investigate prior to publication. *See* Notes 5-7 and accompanying text, *infra*.

the record: the actual language of the allegedly defamatory article,[5] and respondent's confirmation of the article in a tape-recorded, prepublication interview with petitioner.[6]

It is difficult in a short space to improve on the dissent's systematic analysis of the challenged statements in light of respondent's admissions. *See id.* at 49a-58a. As that analysis reveals, respondent specifically admitted each statement subsequently challenged in the article. Those admissions alone require reversal both of the finding that the article was not substantially true and of the finding that petitioner acted with reckless disregard of the truth of the statements.[7]

The error of the court below is shown as well by the contrast between statements of this Court in *Bose* and those of the court below. *Bose* states:

> We hold that the clearly-erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times Co. v. Sullivan*. Appellate judges in such a case must exercise *inde-*

[5] Rather than address the challenged statement, the court below focused on an article that appeared two days prior to the alleged defamatory article. App. at 14a-16a. In fact, the court chose to attach as an appendix to its opinion this prior article rather than the disputed article and not once quoted the challenged language. *Id.* at 45a-49a.

[6] The dissent aptly observed: "It is precisely because Connaughton's statements 'are a matter of record' that this court is obliged to consider them in determining whether the judgment against [petitioner] is contrary to the first amendment." App. at 59a.

[7] As the dissent pointed out, reversal in the face of these admissions was demanded even under a deferential Rule 52(a) review. App. at 50a. *A fortiori*, the court should have reversed under the independent review prescribed by *Bose*.

> *pendent judgment* and determine whether the *record* establishes actual malice with convincing clarity.

466 U.S. at 514 (emphasis added). Amazingly, the court below responded:

> Mindful of the dictates of *Bose Corp.*, this court's attention is, in the first instance, directed to an examination of the entire record of subsidiary, operative or preliminary facts (hereinafter referred to as the operative facts), however characterized, to determine if the *jury's findings* were *clearly erroneous.*

App. at 4a (emphasis added).

On the issue of the fact finder's opportunity to observe the demeanor of the witness at trial, this Court in *Bose* stated that appellate courts are "permitted" to give "due regard" to the fact finder's determination of witness credibility and accepted the conclusion that one of the defendant's chief witnesses was not credible. 466 U.S. at 499-500. But the Court went on to hold that a fact finder's refusal to believe a witness does not necessarily establish actual malice. Instead, in *Bose*, the Court reviewed for itself the inference the district court had drawn from its creditability finding. Because there was no other evidence supporting that inference—that the author had known of his incorrect use of language at the time of publication—the Court determined that actual malice had not been proven by clear and convincing evidence. *Id.* at 512.

The court below, however, effectively avoided any appellate review by holding that jury members are the "ultimate factfinders" on the issue of witness credibility and by characterizing this as a case whose "core issue was simply one of credibility to be attached to the witnesses . . . . In sum, the jury simply did not believe the defendants' [sic] witnesses, its evidentiary presentations or its arguments." *App.* at 27a-28a. Such a total

disregard of the Court's requirement of independent review should not escape scrutiny by this Court.

II. Actual Malice Cannot Be Predicated Constitutionally On A Political Endorsement, Competition Between Members Of The Media Or Common Law Malice.

A. Basing Actual Malice on a Newspaper's Endorsement of a Political Candidate Violates the First Amendment.

The Sixth Circuit in part based its affirmance of the jury's finding of actual malice on the petitioner's endorsement of an incumbent judge, the respondent's political rival.[8] But a news medium's editorial position cannot be allowed to constitute admissible evidence of actual malice for at least three reasons. First, allowing an editorial to constitute evidence of actual malice violates the First Amendment principle of viewpoint neutrality. Second, it circumvents the requirement that defamation liability be based only on state of mind with respect to truth or falsity: here the jury was permitted to draw an inference of *common law malice* from the content of *other* speech published by petitioner—speech fully protected by virtue of its being opinion—and then draw an inference of *actual malice* from the presumed common law malice. Third, allowing such editorial speech to serve as evidence of actual malice would severely chill important political speech.

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[8] The majority observed that the defendant had endorsed the rival candidate six years earlier when he first ran for office, and again endorsed him the day before the election (five days *after* publication of the article of which plaintiff complains). The court below then assigned to the jury the finding that petitioner was motivated to publish the November 1 article "by a desire to promote Dolan as its candidate . . . by discrediting Connaughton and thereby indirectly discrediting the *Enquirer* for competitive reasons." App. at 27a. *See also id.* at 35a (jury "could have concluded" that petitioner was "singularly biased" in favor of rival due to "unqualified, consistently favorable editorial and daily news coverage received by Dolon [sic]"), 5a, 21a, 42a-43a.

Since *New York Times* this Court has developed the contours of libel law by balancing the "legitimate state interests" in compensating individuals for injury to reputation against fundamental First Amendment protections to provide "adequate breathing space" for speech and to prevent self-censorship. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-50 (1974); *New York Times*, 376 U.S. at 271-72. This balancing process has produced, for the sake of certainty and predictability, a number of rules. *Gertz*, 418 U.S. at 343-44. For example, the state interest is always defeated whenever a public figure is unable to prove actual malice by clear and convincing evidence. *E.g.*, *id.* at 342-43. Likewise, the state has no legitimate interest in imposing liability without proof of fault, *id.* at 347, or without actual injury, *id.* at 349, in light of the countervailing First Amendment interests.

The court below, by inferring actual malice from petitioner's endorsement of respondent's political rival, violates another fundamental rule: states have no legitimate interest in imposing liability on libel defendants for endorsing particular political candidates in light of the First Amendment interest in protecting political speech.[9] This Court has repeatedly held that political speech is at "the core of the First Amendment." *E.g.*, *Brown v. Hartlage*, 456 U.S. 45, 52 (1982). *See also FCC v. League of Women Voters*, 468 U.S. 364, 375-76 (1984) (editorializing on matters of public importance "is entitled to the most exacting degree of First Amendment protection"). This core area of protection "is to be afforded for 'vigorous advocacy' no less than 'abstract dis-

[9] Moreover, the endorsement of a political candidate falls squarely within the scope of constitutionally protected opinion. *Gertz*, 418 U.S. at 339-40 ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."). *See also Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876 (1988) (even outrageous statements of opinion in the form of parody are privileged).

cussion,'" *New York Times*, 376 U.S. at 269 (quoting *NAACP v. Button*, 371 U.S. 415, 429 (1963)), and "includes discussions of [political] candidates," *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

Content-based restrictions on political speech violate the First Amendment principle of viewpoint neutrality. *E.g.*, *Boos v. Barry*, 108 S. Ct. 1157 (1988). *See also City of Lakewood v. Plain Dealer Publishing Co.*, 56 U.S.L.W. 4611 (U.S. June 17, 1988) (a state cannot employ content—or viewpoint-specific criteria in restricting speech). *Boos* recently affirmed that the state interest in protecting public figures is not sufficiently compelling to justify content-specific penalties for even "insulting" and "outrageous" political speech. 108 S.Ct. at 1164 (citing *New York Times* and *Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876 (1988)). Moreover, *Bose* itself emphasized that preservation of the "principle of viewpoint neutrality that underlies the First Amendment" is one of the primary goals of independent review by appellate courts. 466 U.S. at 505. The court below violated that principle not only by refusing to review independently the jury verdict,[10] but also by upholding the jury's finding of actual malice on a content-specific basis: the petitioner's endorsement of a particular political candidate. To recognize such a recovery penalizes individuals for publicly endorsing political candidates or ideologies

[10] An additional example is the court's failure to review independently the constitutionality of a punitive damages award of $195,000 that was totally out of proportion to the minimal $5,000 compensatory award. Such a disparity must be attributed to the jury's desire to punish the petitioner for taking an unpopular stand because there was no competent evidence of actual malice. This award underscores another disturbing trend in libel actions against media defendants. Disproportionately large punitive awards are beginning to dominate these cases. Nearly 60% of libel damage awards during the period between 1980 and 1984 included an award for punitive damages. *Libel Def. Resource Center Bull. No. 11*, at 14-15 (Nov. 15, 1984). Moreover, punitive damages during that period amounted to 80% of the total damages awarded. *Id.*

while speaking openly and vigorously about rival political figures.

Allowing the endorsement to give rise to an inference of actual malice also circumvents the actual malice requirement of *New York Times*. The actual malice rule at a minimum requires the factfinder to look behind the allegedly defamatory words to the defendant's state of mind as to truth or falsity; nor is it enough that the defendant harbored ill will toward the plaintiff. *Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876, 881 (1988). Instead, the Sixth Circuit focused on other words published by the defendant, not even at issue in the case, and drew an inference of ill will from their content, which ill will in turn served as evidence of actual malice. A fact finder should not base a finding of actual malice on an inference of common law malice presumed from the content of the allegedly defamatory speech actually at issue in the case. But it is even worse for such an inference to be based on other editorial speech not even alleged to be defamtory.

Admission of evidence of a defendant's editorial position poses too great a threat to the free flow of political speech. It is the nature of editorials that they address the most controversial and topical issues of the day, issues that more often than not are contemporaneously dealt with in news stories. If news media must worry that their editorial commentaries and positions will become evidence of bias when the subjects claim news stories are defamatory, editorials will become cautiously worded and equivocal. Allowing the fact finder to consider a news medium's editorial position as evidence of actual malice "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' (citation omitted), which must be protected if the guarantees of the First and Fourteenth Amendments are to

prevail." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 276-77 (1971).

B. Competition Between Members of the Media Is Constitutionally Irrelevant to a Determination of Actual Malice.

The assessment of the court below that a newspaper's normal competition in the marketplace constitutes evidence of actual malice is a pernicious intrusion on core First Amendment protection. Because the media are necessarily motivated in part by commercial realities and competition, the court's ruling essentially creates a presumption of actual malice in virtually every libel action that names a media defendant, thereby eliminating the requirement imposed by *New York Times* that actual malice be proved by clear and convincing evidence.

A determination of actual malice turns on whether a statement was published with serious doubts about its truth. *E.g., St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Whether a story is published under competitive pressure to produce hard-hitting investigative articles is simply irrelevant to that determination. *Tavoulareas*, 817 F.2d at 796-97 & n.50. The presence or absence of competition adds nothing to the basic inquiry. "[T]he First Amendment forbids penalizing the press for encouraging its reporters to expose wrongdoing by . . . public figures." *Id.* at 796. Indeed, the existence of competition serves the First Amendment goal of securing "'the widest possible dissemination of information from diverse and antagonistic sources.'" *New York Times*, 376 U.S. at 266 (citation omitted).

The fact that political speech may have commercial value in terms of newspaper sales in no way diminishes its political nature or reduces the protection afforded by the First Amendment. In rejecting the notion that a political advertisement in a newspaper was less protected than other political speech, this Court stated in *New York Times*:

> That the Times was paid for publishing the advertisement is *as immaterial in this connection as is the fact that newspapers and books are sold.*

376 U.S. at 266 (emphasis added).[11]

C. Common Law Malice Is Constitutionally Insufficient to Establish Actual Malice.

The Court need look no further than its decisions in *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974); and *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970), to perceive the vacuity of the remaining "evidence" of actual malice relied on by the court below.[12] A publisher's lack of personal knowledge, failure to heed the consequences of publication, failure to consider whether a statement may defame and failure to investigate a statement's accuracy are all constitutionally insufficient to establish actual malice by clear and convincing evidence. *St. Amant*, 390 U.S. at 730-33. Likewise, common law

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[11] This was reaffirmed in the context of obscenity cases when this Court held that granting *any* weight to the fact that a publication is sold for profit would "offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Ginzburg v. United States*, 383 U.S. 463, 474 (1966). *See also Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) (quoting passage from *Ginzburg*); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983) (an economic motivation for mailing pamphlets does not, by itself, reduce the publication to less-protected commercial speech).

[12] The "evidence" relied on by the court, *see* App. at 35a-36a, consisted of manufactured jury findings. *See* Note 4 and accompanying text, *supra*. Moreover, many of those purported "findings" focused on common law malice, not constitutional malice. For example, the court credited as evidence of actual malice that petitioner (1) was supposedly biased against respondent, (2) was attempting to discredit respondent and (3) sought to maximize the impact of the article.

malice, variously described as hatred, spite, ill-will, hostility or a deliberate intention to harm, is a constitutionally impermissible basis for establishing actual malice. *Old Dominion*, 418 U.S. at 281-82; *Greenbelt Coop.*, 398 U.S. at 9-11. *See also Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. at 881 (the First Amendment prohibits finding actual malice on the basis of "bad motive"); *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 251-52 (1974) (distinguishing actual malice from common law malice).

Although "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports," *St. Amant*, 390 U.S. at 732, verification of the informant's statements in this case came from respondent himself, in his prepublication admissions to petitioner.[13] Nothing in the record supports a finding of actual malice by clear and convincing evidence.

III. Summary Reversal Is Warranted In This Case.

The Sixth Circuit Court of Appeals so clearly departed from its constitutional duty independently to "determine whether the record establishes actual malice with convincing clarity," *Bose*, 466 U.S. at 514, that summary reversal is warranted under Supreme Court Rule 23.1. That failure was compounded by the court's affirmance of the jury's finding of actual malice on constitutionally impermissible and irrelevant grounds, while ignoring prepublication admissions by the respondent that establish the substantial truth of the challenged statements and preclude a finding of actual malice. Summary reversal is especially appropriate in this case because "judges—and *particularly Members of this Court*—must exercise

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[13] See Judge Guy's dissent for a summary of respondent's admissions. App. at 50a-58a.

[independent] review in order to preserve the precious liberties established and ordained by the Constitution." *Id.* at 510-11 (emphasis added).

CONCLUSION

For the reasons stated, the *amici* respectfully request that this Court grant the petition for certiorari, independently review the record and summarily reverse the decision of the Sixth Circuit for its failure to exercise independent review and for crediting as proof of actual malice constitutionally impermissible and irrelevant evidence.

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APPENDIX

APPENDIX

IDENTITY OF INDIVIDUAL AMICI

The American Society of Newspaper Editors is a nationwide professional organization of more than 1,000 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society include the ongoing responsibility to improve the manner in which the journalism profession carries out its obligations to provide an unfettered and effective press in the service of the American people.

The Associated Press ("AP"), the world's largest news gathering organization, is a mutual news cooperative organized under the Not-For-Profit Corporation Law of the State of New York. AP engages in gathering and distribution of news of local, national and international importance to its member newspapers and broadcast stations across the United States and throughout the world. The AP, on its own behalf and on behalf of its members, has a vital interest in protecting the right of the press to gather and publish news.

Capital Cities/ABC, Inc., through subsidiaries, owns and operates television and radio broadcasting stations and national television and radio networks; it also publishes newspapers, magazines, and books.

CBS Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks. The CBS Publishing Group publishes numerous nationally distributed magazines and hard-cover books.

The Cincinnati Enquirer is a daily newspaper published in Cincinnati, Ohio as a division of Gannett Satellite Information Network, Inc., with daily circulation of 194,804 and Sunday circulation of 328,378.

The Chronicle Publishing Company publishes the *San Francisco Chronicle* with a daily circulation of 565,000

and a Sunday circulation of 730,000. The Chronicle Broadcasting Company, a division of Chronicle Publishing Company, also operates three television stations.

Dow Jones & Company, Inc. publishes, *inter alia, The Wall Street Journal, Barron's National Business and Financial Weekly,* The Dow Jones News Service, and a number of other publications. Through its Ottaway Newspapers, Inc. subsidiary, it publishes newspapers in 23 communities in 13 states across the nation.

Globe Newspaper Company publishes *The Boston Globe,* a daily newspaper in Boston which has the largest circulation in New England, with a daily circulation of approximately 500,000 and a Sunday circulation of approximately 800,000.

The National Association of Broadcasters, organized in 1922, is a nonprofit incorporated trade association comprised of more than 5,000 radio stations, 970 television stations, and the major commercial broadcasting networks. NAB's members cover, produce, and broadcast the news to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public concern.

Miami Herald Publishing Company is an unincorporated division of Knight-Ridder, Inc., which publishes the *Miami Herald,* a newspaper of daily circulation throughout south Florida.

National Broadcasting Company, Inc. owns and operates a national television network, and through subsidiaries operates television stations, all of which are engaged in the gathering and dissemination of news to the public.

The National Newspaper Association is a national trade association representing the interests of weekly and daily newspapers throughout the country. Founded in

1885 and with more than 5,000 members, NNA is the oldest and largest national trade association in the newspaper industry. For over a century, a prime concern of NNA has been to ensure that political debate in this country be conducted in an open and robust manner.

The Newsletter Association is the international trade association representing 850 publishers of newsletters and specialized information services. NA has a long-standing commitment to the free exchange of information and opinion through the written word as protected by the First Amendment; therefore it has an interest in the outcome of this particular case.

The New York Times Company publishes thirty five newspapers, including *The New York Times,* a daily newspaper with nationwide circulation of 1.1 million daily and Sunday circulation of over 1.6 million. It also publishes numerous national magazines and owns radio and television stations and a cable television system.

The Philadelphia Inquirer is a newspaper published daily by Philadelphia Newspapers, Inc. in Philadelphia, Pennsylvania, with a daily circulation of 502,507 and a Sunday circulation of 989,026 in the greater Philadelphia metropolitan area.

The Radio-Television News Directors Association is a professional association of electronic journalists. The Association has more than 2,500 members who gather, edit, and disseminate news and other public affairs information carried by the national broadcast and cable networks, local radio and television broadcast stations, and cable television systems.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news reporters and editors dedicated to protecting the First Amendment interests of the news media. The Reporters Committee has appeared in virtually every recent Supreme Court case involving the First Amendment rights of reporters

to gather and disseminate news and information. It has provided representation, information, legal guidance, or research in virtually every major press freedom case litigated since 1970.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, not-for-profit organization of nearly 20,000 members. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism.

Time Inc. is the largest publisher of general circulation magazines in the United States. It publishes and distributes *Time* magazine, *Fortune*, *Sports Illustrated*, *People*, *Money*, *Life*, and, through its subsidiary, Southern Progress Corporation, also publishes *Southern Living* and *Southern Accent* magazines. *Time* magazine alone has a domestic circulation of 4.6 million.

The Times Mirror Company publishes the *Los Angeles Times*, a newspaper with a circulation of more than 1,137,000 daily and more than 1.4 million on Sunday. Time Mirror also publishes seven other newspapers including *Newsday*, the *Baltimore Sun*, and *The Hartford Courant*, with a combined Sunday circulation of more than two million copies.

Tribune Company is a communications company owning *The Chicago Tribune*, *The New York Daily News*, the *Orlando Sentinel*, the *Fort Lauderdale News and Sun-Sentinel*, the *Escondido (CA.) Times-Advocate*, the *Palo Alto Times-Tribune*, the *Newport News, Virginia Daily Press* and *The Times-Herald*, and television stations in Chicago, New York, Los Angeles, Denver, Atlanta and New Orleans.